BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD R. GREEN	)	
Claimant	)	
	)	
VS.	)	
	)	
KEY CONSTRUCTION	)	
Respondent	)	Docket Nos. 253,916;
	)	261,591
AND	)	
	)	
ST. PAUL FIRE & MARINE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the July 2, 2003 Award by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on December 16, 2003.

APPEARANCES

John C. Nodgaard of Wichita, Kansas appeared for the claimant. Vincent A. Burnett of Wichita, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained an accidental injury on June 11, 1998, and as a result, was left with a ten percent permanent partial whole body disability. The ALJ concluded that the claimant voluntarily resigned from his job with the respondent. Thus, claimant was denied any work disability due to the fact that, had the claimant not resigned, he would still be employed and earning a comparable wage.

The claimant requests review of this decision alleging he is entitled to additional temporary total disability benefits, an increased functional impairment for the June 11, 1998 injury and payment of outstanding medical bills as well as a substantial work disability as a result of a series of injuries that culminated on October 25, 2000, his last date of work for respondent. Claimant adamantly maintains the discipline he received from respondent in October 2000 was nothing more than retaliation for the filing of his workers compensation claim. He further maintains he was unable to work past October 25, 2000 as a result of a re-injury to or progressive worsening of his back that occurred over time.[1] His decision to leave his position on that date was justified under the circumstances because he was no longer able to do his regular job duties.

Respondent argues the ALJ's decision should be affirmed in all respects. Specifically, respondent maintains claimant sustained a single acute injury on June 11, 1998 [2] for which he received surgical treatment and was later returned to work without significant physical difficulties, performing all the normal job duties required of him. Claimant continued to work for respondent from February 1999 until October 25, 2000 when, according to respondent's witnesses, he voluntarily resigned. Respondent denies there were any additional injuries during this period and contends if he experienced ongoing problems with his back, they were related to the June 11, 1998 accident. Respondent also argues claimant is not entitled to a work disability because it permitted claimant to alter his work habits and would have continued to modify the job in such a manner so as to accommodate those limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

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[1] The alleged series of accidents ending October 25, 2000 forms the basis for Docket No. 261,591.

[2] This accident forms the basis for Docket No. 253,916.

The ALJ took great care in setting forth the facts surrounding this claim and the Board finds there is no need to repeat them herein except as necessary to explain its findings. The Board otherwise adopts the ALJ's findings and conclusions as set forth in the Award.

Claimant was employed as a working superintendent for respondent and was required to travel throughout the United States to oversee the construction and remodeling of various large commercial buildings. This job also required claimant to do some physical labor, lifting as much as 100 pounds. The record indicates that as the superintendent, claimant had a significant amount of authority to hire individuals to perform the work necessary to be completed while on any given job site. It was not necessary for claimant to actually perform any physical labor and his job could be structured in any way that he saw fit as long as the job was completed.[3]

On June 11, 1998, claimant testified that he was in the process of using a pump with a garden hose attached so as to clean water off a concrete floor of a project he was working on in Lawrence, Douglas County, Kansas. Claimant testified that as he was moving the pump he experienced immediate pain in his lower back and also felt what he described as "shooter" pains going down both legs, most predominately on the right. The compensability of this accident is not in dispute.

Claimant was provided with medical treatment for his complaints and he was able to continue working for respondent. However, claimant was ultimately evaluated by Dr. Richard Brannon, who recommended and performed surgery on December 18, 1998. Dr. Brannon performed a L4-5 diskectomy and laminectomy. Claimant was taken off work for approximately six weeks following surgery and approximately February 1, 1999, he was returned to work with a 20 pound lifting restriction.

Claimant continued to work for respondent at various locations throughout the country until October 25, 2000. In the weeks and months leading up to October 25, 2000, respondent began to receive complaints relating to claimant's work attitude and performance. Respondent's customers were complaining that claimant was hostile, explosive, unprofessional and, at times, volatile. In January 2000 claimant was removed from a project in Memphis, Tennessee at the request of the owner of the remodeling project. In fact, this was the second time claimant had to be removed from a project. He was also removed from a project in Omaha, Nebraska in 1996 or 1997. In both instances, claimant was removed because he had displayed a bad attitude and a volatile temper. In fact, claimant is known by his co-workers as someone who is difficult to get along with, some of them even describing him as "cantankerous." [4]

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[3] Youngers Depo. at 22.

[4] Reynolds Depo. at 8.

In the summer and fall of 2000, claimant was working on a project for one of respondent's customers, Cricket Communications. Claimant testified he began to experience additional back problems while working on this job. Then in early September 2000 he was assigned as an assistant superintendent to another project in Colorado Springs, Colorado. As an assistant superintendent, claimant was permitted to adjust his activities so as to accommodate his physical needs. However, claimant testified that he was required to work more hours and began having major problems with his back, with pain radiating up into his shoulders and "shooters" again in his legs.

In October 2000, the complaints regarding claimant came to the attention of Dean Youngers, the general superintendent for respondent. Mr. Youngers spoke with his supervisor, Larry Gourley, the executive vice president for respondent about claimant and the customers' complaints. The two of them arranged to travel to the construction site in Colorado Springs, Colorado on October 25, 2000. On the way to the meeting, Mr. Youngers and Mr. Gourley concluded they would discuss the complaints with claimant and then suspend him for one week. Their goal was to emphasize the importance of claimant's attitude and the seriousness of his actions.

On that date, they met with claimant towards the end of the work day. Claimant testified that he was upset he was going to be suspended. He advised both Mr. Youngers and Mr. Gourley that if they suspended him, he was going to quit. He also advised that he had approximately 9-1/2 weeks of vacation that he intended to take. If, at the end of that time, they still intended on suspending him, he would quit. Claimant admits that Mr. Gourley implored him not to quit but claimant maintained that if he was to be suspended, he would quit. Larry Gourley admits claimant mentioned that his back hurt during this meeting but there is no evidence that claimant advised he could not perform his job duties.

According to both Mr. Youngers and Mr. Gourley, they made it clear that claimant was suspended. As a result, they maintain claimant voluntarily resigned. Mr. Gourley testified that claimant turned in his company cell phone, the company's keys were also collected and Mr. Gourley agreed that he and claimant would make arrangements for claimant to return the respondent's truck at another time or claimant could purchase the truck at a mutually agreeable price, which claimant ultimately did. Claimant has not worked since that date.

Claimant has been examined and rated by three physicians during the course of these claims. He was first seen by Dr. Pedro Murati, a physiatrist, at the request of his attorney. Dr. Murati found claimant had a ten percent impairment to the body as a whole as a result of his low back injury on June 11, 1998.[5] He did not relate any of claimant's ongoing back problems to the claimant's alleged series of accidents ending on October 25, 2000.

[5] Murati Depo. at 14 and 15.

Dr. Philip R. Mills, also a board certified physiatrist, was the next physician to see claimant and opined as to his permanency, again at the request of his counsel. Dr. Mills concluded claimant had chronic pain syndrome with failed laminectomy syndrome and arachnoiditis. Dr. Mills explained arachnoiditis as a condition that generally affects someone who has had surgery and where, instead of improving, is worse as a result of fibrosis or scarring from the surgical procedure. Dr. Mills assigned a 20 percent to the body as a whole, finding claimant was within the DRE category IV. [6] The only history provided to Dr. Mills was the 1998 injury and there was no indication by claimant to Dr. Mills of any worsening through 2000. Dr. Mills was asked whether claimant's ultimate rating would be less given the fact that he had sustained a prior ankle injury that caused low back complaints dating back to 1995. After some discussion, Dr. Mills agreed that the rating should be reduced by seven percent to reflect the pre-existing impairment. [7]

Lastly, claimant was evaluated by Dr. John McMaster, board certified in emergency medicine, at the request of respondent. He took a history from claimant which indicated a single accident date of June 11, 1998 and conducted a review of the pertinent medical records. According to Dr. McMaster, claimant bore a ten percent whole body permanent impairment relative to his low back injury based on the principles set forth in the A.M.A. *Guides.* [8]

Dr. McMaster was also asked to comment on the rating provided by Dr. Mills. According to Dr. McMaster, he believes Dr. Mills incorrectly categorized claimant as a DRE IV. He testified that Dr. Mills apparently utilized the wrong chart and as a result, the 25 percent Dr. Mills' assigned was in error. Moreover, he testified that a category IV impairment requires a lack of segment integrity in the lumbar spine.[9] Claimant's segment integrity is intact.

After considering all of this evidence, the ALJ concluded claimant sustained a ten percent whole body impairment as a result of the June 11, 1998 accident. The ALJ declined to find any accident occurred over a series of dates and ending on October 25, 2000.

The Board has reviewed all the evidence bearing upon this issue and finds that it agrees with the ALJ's conclusions that claimant sustained a single acute injury on June 11, 1998. However, the Board is persuaded by the testimony of Dr. Mills, the physician who

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[6] At oral argument, claimant's counsel stipulated Dr. Mills' rating should properly have been 20 percent rather than the 25 percent.

[7] Mills Depo. at 34.

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment,* (4th ed.).

[9] McMaster Depo. at 34.

evaluated claimant and diagnosed arachnoiditis, a condition which is by all accounts, quite painful and debilitating. There is no explanation why both Drs. Murati and McMasters failed to account for this diagnosis in their evaluations and ratings nor is there any indication that this diagnosis is not accurate. Accordingly, the Board finds claimant's functional impairment is 20 percent. This finding must, however, be reduced by the seven percent for pre-existing impairment.[10] The net result is 13 percent functional impairment to the body as a whole.

Although claimant continued to work for respondent after his June 11, 1998 injury and subsequent surgery and had complaints of pain, there is no persuasive evidence, medical or otherwise, that would suggest he sustained a second injury or series of injuries. While it is true that there is some suggestion in the medical records that some time between May 19, 1999 (when his first MRI was done) and December 13, 2000 (when the second MRI was completed) there might be an additional bulging disc at the L3-4 level, Dr. McMaster testified that it is unlikely that additional radiological finding, assuming it truly reflects a "new" finding, is responsible for claimant's ongoing back complaints. Dr. Mills testified this change in the MRI findings reflect a "new" area of the claimant's spine which would constitute objective evidence of further injury. However, the MRI films were not viewed by the same individual and it is unclear whether the person interpreting the second MRI had the benefit of the first. In fact, no one who testified in this case had the benefit of both MRI reports. Moreover, the evidence indicates there is a significant element of subjectivity in the interpretation of such tests. Thus, labeling this as a "new" area of herniation or bulge is somewhat misleading and not persuasive. The Board is unpersuaded that claimant sustained a series of injuries once he returned to work in February 1999 and continuing up to the time he left respondent's employ on October 25, 2000.

The ALJ went on to conclude claimant was not entitled to work disability benefits as provided in K.S.A. 44-510e. That statute states:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of injury and the average weekly wage the worker is earning after the injury.

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[10] K.S.A. 44-501(c).

K.S.A. 44-510e sets forth the formula for determining claimant's permanent partial general disability beyond just the functional impairment. But that statute must be read in light of *Foulk* [11] and *Copeland*. [12] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quote statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

According to these appellate court decisions, in determining work disability, the determinative question is whether the worker has made a good faith effort to find and/or retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

In this instance, the ALJ concluded it was more probably true than not that claimant would have been able and was willing to accommodate whatever restrictions claimant might have had as a result of his back injury. Instead, claimant chose to voluntarily resign. The ALJ based these findings not only on claimant's own actions on October 25, 2000, but also on the fact that one of claimant's co-worker's, who was also employed as a superintendent, was a rather elderly gentlemen who walked with the aid of crutches. That individual was able to perform the essential job tasks and had done so for quite some time. Even claimant, in his own testimony, seemed to acknowledge that this individual was doing the job in such a way that claimant, with his back complaints, might benefit from some of his work practices. The uncontroverted evidence shows that the job of superintendent allowed claimant the freedom to do as much as he could, as did this other gentleman, directing and delegating as needed. For these reasons, the ALJ declined to award work disability based upon the principles set forth above.

The Board has reviewed the testimony of Dean Younger, Larry Gourley and claimant and concludes the ALJ's findings are appropriate and should not be disturbed. It is clear that following the October 25, 2000 meeting, respondent had suspended claimant for one week. Claimant made it equally clear that if he was suspended, he would quit. At the conclusion of the meeting, claimant returned his keys, cell phone and eventually made

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. ten91 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

arrangements to purchase the truck he had been driving. All of this leads to the logical conclusion that the employment relationship between claimant and respondent had been severed by claimant. At no time did claimant say he had been fired during the October 25, 2000. Rather, it was always his intention to resign or quit if they suspended him.

By voluntarily resigning his job, claimant failed to act in good faith and, therefore, is not entitled to work disability. But for that act, claimant would still be employed at a comparable wage. Claimant's assertion that respondent "never offered to accommodate the restriction ultimately placed on Mr. Green or ever offered Mr. Green any other position, vocational rehabilitation benefits, or any other vocational assistance" [13] and that he was unable to do the job and therefore entitled to quit is unpersuasive. Up to the moment claimant voluntarily quit, the greater weight of the evidence was that claimant was able to do his job duties and had the ability to control and structure his job in such a way so as to avoid violating whatever restrictions or limitations he might have. He had made a request for additional medical treatment but there was no evidence that he was unable, at that time, to perform his job duties. Rather, there is extensive evidence that he was unable to control his temper in the workplace and that led to a discussion and ultimately a suspension. It was claimant's decision to terminate his employment relationship with respondent that caused a wage loss, not the alleged series of injuries nor the June 11, 1998 injury. Claimant is required to make a good faith effort to retain his employment under the principles set forth in *Foulk* and its progeny. Thus, the ALJ's finding on the issue of good faith is affirmed.

There are medical bills which claimant contends are related to his injuries and should be reimbursed, as he has paid the balance. These bills apparently relate to medications acquired and treatment claimant sought in December 2000 and January 2001, after he was terminated. At this point, Dr. Branan was designated as the treating physician. He was located in Colorado, claimant's home base at the time. The bills claimant seeks to have reimbursed are from physicians other than Dr. Branan. Apparently, claimant sought treatment from an unauthorized physician.

The ALJ's Award indicates that claimant is entitled to "all his outstanding and unauthorized medical, up to the statutory limit." [14] There is no ambiguity in this finding. To the extent claimant paid for treatment that was unauthorized by the respondent those remain his responsibility, after payment by respondent of the $500 in unauthorized medical as provided by the statute.[15]

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[13] Claimant's Brief to the Board (filed July 28, 2003).

[14] Award at 10.

[15] K.S.A. 1997 Supp. 44-510(c)(2).

As for the claim for temporary total disability benefits for the period October 28, 2000 to January 28, 2001, the evidence shows that claimant voluntarily terminated his employment with respondent on October 25, 2000 and thereafter sought treatment with his own personal physician. It was not until January 29, 2001 that the claimant's personal physician concluded claimant was disabled. Up to that point, respondent knew of claimant's physical complaints but did not know claimant was unable to perform his duties. If it had, the uncontroverted evidence is that claimant's restrictions could and would have been accommodated. Quitting work under these circumstances does not entitle the claimant to temporary total disability benefits.

Given claimant's apparent need for ongoing medical treatment, to the extent that respondent has not previously identified a treating physician for claimant, respondent is directed to provide claimant with a list of three physicians from which he may select one to direct his need for ongoing care.

The remaining findings of fact and conclusions of law expressed in the ALJ's Award are affirmed to the extent they are not inconsistent with the findings expressed herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated July 2, 2003, is modified as follows:

The claimant is entitled to 64 weeks temporary total disability compensation at the rate of $351 per week or $22,464 followed by 47.58 weeks of permanent partial disability compensation at the rate of $351 per week or $16,700.58 for a 13 percent functional disability, making a total award of $39,164.58.

As of 12/30/03 there would be due and owing to the claimant 64 weeks of temporary total disability compensation at the rate of $351 per week in the sum of $22,464 plus 47.58 weeks of permanent partial disability compensation at $351 per week in the sum of $16,700.58 for a total due and owing of $39,164.58, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

Respondent is directed to provide a list of three physicians from which claimant may select one to direct his ongoing care, to the extent one is not presently identified.

IT IS SO ORDERED.

Dated this _____ day of December, 2003.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director